

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 30, 2007

STATE OF TENNESSEE v. ROY ANTHONY FERRANTE

Appeal from the Criminal Court for Bradley County
No. M-05-570 Carroll Ross, Judge

No. E2007-00180-CCA-R3-CD - Filed January 8, 2008

After over one year passed between the alleged commission of the offense and the return of a grand jury indictment against the Defendant, Roy Anthony Ferrante, the Criminal Court of Bradley County dismissed his driving under the influence charge, finding that the affidavit of complaint was void and that the State had failed to comply with the Tennessee Rules of Criminal Procedure. The State appealed, arguing that the trial court erred because any defect in the Defendant's affidavit of complaint or arrest warrant was immaterial after a grand jury returned a valid indictment and that the prosecution is not barred by the statute of limitations. The Defendant argues that the trial court properly dismissed the charge because the one-year statute of limitations had expired prior to the grand jury's issuance of a valid indictment. Following our review, we reverse the order of the trial court and remand this case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Steven Oberman, Knoxville, Tennessee, for the appellee, Roy Anthony Ferrante.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Steven Bebb, District Attorney General; and Michelle McFadyen, Assistant District Attorney General, for the appellant, State of Tennessee.

OPINION

Factual Background

Deputy John Cochran of the Bradley County Sheriff's Department stopped the Defendant shortly after midnight on August 15, 2004, after observing him swerve over the white line twice in his pickup truck. Subsequent field sobriety tests indicated the Defendant was intoxicated. He was arrested for driving under the influence. He agreed to give a blood sample and was taken to the hospital prior to being transported to jail. The same day, Deputy Cochran completed an affidavit of complaint which he presented to Norma Hodgson, a deputy clerk for the General Sessions Court of Bradley County. In the affidavit of complaint, Deputy Cochran described the Defendant's arrest as follows:

I observed a red pick-up truck traveling east on Highway 64 prior to Brown Drive. The trucked [sic] swerved over the white line two times. Upon stopping the vehicle, I smelled an odor of alcoholic beverage about [the Defendant's] person. [The Defendant] stated he had been drinking. While exiting the vehicle the driver stumbled twice. His eyes were red and bloodshot. Upon performing the HGN the driver's eyes had unsteady pursuit. During the one-legged stand he put his foot down twice and then lost count at twelve. During the walk and turn he never touched his feet, heel [sic] to toe and was stopped early due to the danger of him falling. Prior to the walk and turn [the Defendant] almost fell over on me when I asked him to stand beside me while I demonstrated. [The Defendant] gave consent to have a blood test. He was transported to Bradley ER and then to the BCJC.

While under oath, Deputy Cochran swore to the facts alleged in the affidavit of complaint, and Ms. Hodgson signed it. Sometime later that day, the Defendant was released on bond.

The next day, on August 16, 2004, the Defendant was arraigned in general sessions court, and his case was set for a preliminary hearing. Thereafter, the Defendant and his attorney appeared on dates set for the preliminary hearing in the general sessions court, but each time the hearing was postponed or continued. The reasons for the continuances are not set forth in the record.

Over one year later, on August 23, 2005, the Defendant filed in the general sessions court a motion to dismiss alleging that Rule 3 of the Tennessee Rules of Criminal Procedure had been violated because "the deputy clerk who signed the affidavit of complaint did not have legal training and was not capable of making the [required] probable cause determination." In support of the motion, the Defendant submitted the affidavit of Ms. Hodgson which established that she had never received any "legal training" regarding a probable cause determination and that she "did not know or understand the legal definition of probable cause." Ms. Hodgson further stated in the affidavit that she had only been trained to review arrest warrants to ensure the factual information was accurate and not to make a determination of probable cause and that when she signs an arrest warrant, she does so "without the independent exercise of discretion or judgment."

On September 23, 2005, the general sessions court conducted a preliminary hearing and also considered the Defendant's motion to dismiss. At the hearing, the judge of the general sessions court ordered that an arrest warrant be prepared, and then the general sessions judge signed it. The judge also signed the previously filed affidavit of complaint originally signed by Ms. Hodgson. The Defendant's motion to dismiss was denied, and his case was bound over to the grand jury.

The Defendant then filed in the Criminal Court for Bradley County a petition for certiorari and appeal from the "final bind-over order" of the general sessions court. In his petition, the Defendant asserted that he was prosecuted pursuant to a void affidavit of complaint and that it could not be corrected by the actions of the general sessions court taken on September 23, 2005, because the one-year statute of limitations had expired. In response, the general sessions court issued a "Memorandum to Support Denial of Motion to Dismiss." In the memorandum, the court set out the following findings of fact:

An officer arrested Defendant without a warrant on Sunday, August 15, 2004, and charged him with DUI. Defendant was first taken to have blood drawn to determine its alcohol content, then to jail. Later that same day Defendant was released on bond and the arresting officer appeared before a deputy clerk where he was sworn and both signed the affidavit of complaint. The State conceded that this deputy clerk was not qualified to make a probable cause determination.

The next day, Monday, August 16, 2004, the judge read the affidavit of complaint and determined it sufficiently stated probable cause when he arraigned the Defendant. Sometime earlier the affidavit of complaint had been filed and the case given a docket number.

In the memorandum, the general sessions court further explained that there was no need to issue an arrest warrant in this case because the Defendant had already been properly arrested without a warrant, as authorized by Tennessee Code Annotated section 40-7-103.

On October 27, 2005, a grand jury returned a two-count indictment against the Defendant, alleging that he committed the offense of DUI on August 15, 2004 by either driving under the influence of an intoxicant proscribed by Tennessee Code Annotated section 55-10-401(a)(1) or by driving while the alcohol concentration in his blood or breath was eight-hundredths of one percent (.08%) or more. See Tenn. Code Ann. § 55-10-401(a)(2).

On August 14, 2006, the criminal court conducted a hearing on the Defendant's petition for certiorari and appeal from the general sessions court's order dismissing his motion to dismiss. At the hearing, the State conceded that Ms. Hodgson was not qualified to make a probable cause determination. The criminal court ordered further briefing on the matter, and on January 9, 2007, issued an order dismissing the indictment. Disagreeing with the general sessions court, the criminal court reasoned that because more than a year passed before an arrest warrant or an indictment was issued and Ms. Hodgson was not capable of making the required probable cause determination, the

mandatory requirements of Rules 3 and 5 of the Tennessee Rules of Criminal Procedure had not been complied with. As a result, the criminal court dismissed the Defendant's indictment.

The State now appeals the criminal court's order of dismissal.

Analysis

I. Standard of Review

The material facts in this case are not disputed, and the resolution of this appeal rests solely on issues of statutory construction, which present questions of law. Accordingly, our review is simply de novo. State v. Tait, 114 S.W.3d 518, 521 (Tenn. 2003) (citing Beare Co. v. Tenn. Dep't of Revenue, 858 S.W.2d 906, 907 (Tenn. 1993)) (other citation omitted).

II. Statute of Limitations

On appeal, the Defendant argues that the affidavit of complaint "was void at its inception" because it did not comply with Rule 3 of the Tennessee Rules of Criminal Procedure,¹ and therefore its issuance and filing did not operate to toll the one-year statute of limitations applicable to misdemeanors. Further, the Defendant contends that because the statute of limitations elapsed before the preliminary hearing and the return of the indictment by a grand jury, neither of those actions can serve to cure the defects in the affidavit of complaint.

The maximum punishment for a Defendant's first DUI conviction is incarceration for eleven months and twenty-nine days. Tenn. Code Ann. § 55-10-403(a). Offenses punishable by confinement for less than one year are classified as misdemeanors. Tenn. Code Ann. § 39-11-110. The statute of limitations for misdemeanors is provided by Tennessee Code Annotated section 40-2-102, which states in relevant part that "all prosecutions for misdemeanors shall be commenced within the twelve (12) months after the offense has been committed." Accordingly, because the Defendant's offense was alleged to have been committed on August 15, 2004, to withstand a statute of limitations challenge, the prosecution must have commenced within the meaning of Tennessee Code Annotated section 40-2-102 by August 15, 2005. See Tait, 114 S.W.3d at 521-22.

The "commencement" of a prosecution, within the meaning of Tennessee Code Annotated section 40-2-102, is defined by statute:

¹ Rule 3 of the Tennessee Rules of Criminal procedure states:

Rule 3. The Affidavit of Complaint. — The affidavit of complaint is a written statement alleging that a person has committed an offense and alleging the essential facts constituting the offense charged. The affidavit of complaint shall be made upon oath before a magistrate or a neutral and detached court clerk who is capable of the probable cause determination required by Rule 4.

A prosecution is commenced, within the meaning of this chapter, by finding an indictment or presentment, the issuing of a warrant, the issuing of a juvenile petition alleging a delinquent act, binding over the offender, by the filing of an information as provided for in chapter 3 of this title, or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense.

Tenn. Code Ann. § 40-2-104 (emphasis added); see also *State v. Nielsen*, 44 S.W.3d 496, 499 (Tenn. 2001). Thus, the prosecution can be commenced for the purpose of tolling the statute of limitations under this provision in a number of ways. One way the prosecution is commenced (and the statute of limitations thereby tolled) is when a defendant or his lawyer appears in general sessions court for the purpose of continuing the matter or any other purpose involving the offense. Tenn. Code Ann. § 40-2-104.

In the present case, the trial court found that the day after his arrest, the Defendant appeared in general sessions court and was arraigned in open court. In his appellate brief, the Defendant further states that after his arraignment, he and his attorney “appeared on dates set for preliminary hearing in the General Sessions Court for Bradley County, Tennessee. At each setting, the case was postponed. The case was continued for over one year. The record is silent as to the reasons for these continuances.”

The Defendant argues that the affidavit of complaint signed by Ms. Hodgson was void at its inception and could not operate to commence the prosecution or toll the statute of limitations. Notwithstanding the Defendant’s contentions and regardless of whether the affidavit of complaint was defective, we conclude that the prosecution commenced in this case and the statute of limitations was tolled when the Defendant personally appeared and was arraigned by the general sessions judge in open court. See Tenn. Code Ann. § 40-2-104; see also *State v. Kirk*, 613 S.W.2d 485, 486 (Tenn. Crim. App. 1980) (concluding that the defendant’s first appearance in city court commenced the prosecution of his case for statute of limitations purposes).

II. Effect of Superseding Indictment

The State argues that any alleged error in the affidavit of complaint “was rendered moot by the return of a valid indictment.” Specifically, the State contends that “[e]ven if the affidavit of complaint and arrest warrant were void, such does not affect the [g]rand [j]ury’s return of a valid indictment.” The Defendant counters essentially that an indictment “returned over a year after arrest—without an intervening valid arrest warrant or affidavit of complaint—is barred.”

Because we have concluded that the statute of limitations was tolled by the Defendant’s appearance in general sessions court, the indictments returned by a grand jury on October 27, 2005, were not time-barred. See *Nielson*, 44 S.W.3d at 499–500 (concluding that when “the prosecution in the present case was timely commenced by one of the statutory methods set forth in [Tennessee

Code Annotated section] 40-2-10[4],” an indictment issued after the four-year statute of limitations had passed was timely) (citing State v. Messamore, 937 S.W.2d 916, 917–19 (Tenn. 1996)) (other citations omitted).

Moreover, “all questions as to the sufficiency of the warrant are foreclosed by the finding of an indictment, because [by statute] grand juries in this state are given inquisitorial powers over all indictable or presentable offenses committed or triable within the county.” Jones v. State, 332 S.W.2d 662, 667 (Tenn. 1960). The Jones court further explained why a grand jury’s indictment served the purpose of correcting any error in an arrest warrant, stating that

it would be a miscarriage of justice to hold that when the probability of the commission of a crime has been called to the attention of the grand jury by either a defective or even a void warrant, the grand jury would be powerless to investigate the situation further and to find a valid indictment for whatever offense or offenses their investigation might develop.

Id.; see also State v. Wilson, 6 S.W.3d 504, 507 (Tenn. Crim. App. 1998) (noting that the State could have cured a void warrant by having the Defendant indicted by a grand jury); Sidney McGlowan v. State, No. W2000-01925-CCA-R3-PC, 2001 WL 1584130, at *4 (Tenn. Crim. App., Jackson, Nov. 29, 2001) (concluding that “any alleged error in the affidavit of complaint was cured by the subsequent indictment”). Further, when a prosecution is timely commenced, there is no requirement that an indictment issued after the statute of limitations has passed allege facts showing that the statute of limitations was tolled. Nielson, 44 S.W.3d at 499. Accordingly, in the present case, any defect in the affidavit of complaint was cured by the indictment, and the prosecution of the Defendant can proceed on that indictment.

Conclusion

Based on the foregoing authorities and reasoning, we reverse the order of the trial court dismissing the indictment against the Defendant and remand for further proceedings consistent with this opinion.

DAVID H. WELLES, JUDGE